

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

OFFICE COPY
BRIEF AND APPENDIX
FOR APPELLANT

IN THE
United States Court of Appeals

/ FOR THE DISTRICT OF COLUMBIA.

—
No. 8058
—

859
FILED NOV 10 1954

Joseph W. Stewart
F. REGIS NOEL, OTTO G. VAN SENDEN, AND
CHARLES J. SHELLHORN, TRUSTEES, *Appellants.*

v.

MAURICE BASKIN, *Appellee.*

—
**Appeal from Final Decree of District Court of the United
States for the District of Columbia.**
—

WILLIAM E. RICHARDSON,
Attorney for Appellants.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8058.

F. REGIS NOEL, OTTO G. VAN SENDEN AND
CHARLES J. SHELLHORN, TRUSTEES, *Appellants*,

v.

MAURICE BASKIN, *Appellee*.

BRIEF OF APPELLANTS.

JURISDICTIONAL STATEMENT.

This appeal is from a summary judgment of the District Court of the United States for the District of Columbia entered August 1, 1941, dismissing plaintiffs' action for the recovery of \$11,000 and interest on promissory notes of the defendant (appellee) Baskin.

The judgment was entered on a motion for summary judgment under rule 56 of the Rules of Civil Procedure upon the ground that action was barred by the Statute of Limitations. (App. 22)

STATEMENT OF THE CASE.

The defendant appellee, Maurice Baskin, on September 1, 1924, executed certain promissory notes to the order of John B. Davis, payable on or before eight years after date, secured by deed of trust on certain real estate in the District of Columbia. The payee, John B. Davis, endorsed with recourse the three notes in suit aggregating \$11,000 and prior to their maturity they were negotiated to one Herman H. Van Senden. (App. 2)

The latter died in the year 1929 and the National Savings and Trust Company, Jessie M. Van Senden and Otto G. Van Senden, became administrators of his estate. On November 15, 1939, prior to the filing of this suit, plaintiffs were appointed trustees by decree of the District Court to complete the liquidation of this estate, taking as such trustees all of the remaining assets of the estate including the notes in controversy. (App. 1)

By their terms these notes were due on or before September 1, 1932. The three year Statute of Limitations (Code D. C. Title 24, sec. 341) would, except for the matter hereinafter stated, operate as a bar, after September 1, 1935.

Photostat copies of the notes were attached to the Complaint. (App. 5-10)

Prior to March 3, 1934, the deed of trust by which these were secured was extinguished by the foreclosure under a prior deed of trust, no surplus over the prior trust being realized.

On July 23, 1934, the defendant, Baskin, executed a certain written instrument under seal whereby, in consideration that the administrators who then held said notes would withhold suit thereon until after September 2, 1934, said Baskin waived the Statute of Limitations thereon. This waiver was without prejudice to the assertion by him of any and all other defenses to said notes or any of them. This instrument was filed as an exhibit to the complaint. (App. 11)

The defendant filed pleas asserting five defenses. These pleas are not regarded by us as material to the issues on appeal. They are set out in full on pages 11-16 of the Appendix.

The defendant then on May 16, 1941, filed a motion for summary judgment on pleadings (App. 17) upon the ground that the action was not commenced within the time limited by law.

The District Judge heard argument, filed a memorandum opinion (App. 17-22) and on August 1, 1941, entered a final judgment for the defendant. (App. 22)

The appeal is from this judgment. (App. 23)

POINTS ON APPEAL.

1. By the agreement of July 23, 1934 defendant for a valuable consideration waived by the Statute of Limitations generally and unconditionally, and his plea of the statute should be rejected.

2. His covenant not to plead the Statute of Limitations in any action on these notes was executed by the defendant on July 23, 1934, under his seal and was at least valid and enforceable for twelve years from its date.

3. The allegations contained in the defendant's pleas, which, in the memorandum opinion of the District Judge sustaining the motion for judgment, were accepted as if the facts had been established by proof at trial, were not proper for consideration by the Court on the motion for judgment.

STATUTES CITED.

D. C. Code, Title 24, sec. 341:

“No action shall be brought * * * on any other bond or single bill, covenant, or on other instrument under seal after twelve years after the accruing of the cause of action thereon; nor upon any simple contract, express or implied, * * * after three years from the time when the right to maintain any such action shall have accrued; * * *”

SUMMARY OF ARGUMENT.

1. An unrestricted waiver, or agreement to waive, the statute of limitation, founded on a sufficient consideration such as forbearance to sue, is held in many jurisdictions to be unlimited as to time.

In others it is regarded as requiring suit to be filed within a reasonable time thereafter. Other jurisdictions treat the waiver as a new contract and as such subject it to the applicable limitation of the statute.

This Court, in *Mann v. Cooper*, 2 App. D. C. 226-239, adopted the view that such a waiver is perpetual. It considered and rejected the more restricted views of other jurisdictions.

Such a decision constituted a "rule of property" in this jurisdiction, upon which persons may rely and it should not be altered to their detriment.

2. The waiver was under seal. Many cases treat the transaction as a new agreement, permitting it to be invoked in the instant suit to avoid circuitry of action. As such it comes under the twelve year period of limitation.

3. The memorandum of the District Judge shows that he accepted and relied on the matters averred in the defendant's pleas. On a defendant's motion for summary judgment the pleas filed by his counsel are not admitted. Their purpose is to form issues for trial and under our system of pleading no answer by the plaintiff is permitted. (Rule 7, Rules of Civil Procedure)

ARGUMENT.

Points One and Two.

Appellants claim that their action was brought in time (1) because the defendant's waiver of the statute of limitations was unlimited as to time, or (2) because the suit was filed within twelve years after the execution of the sealed waiver.

As many of the cases on this subject consider both theories, we have combined the discussions of the two points.

The agreement signed by the defendant, Baskin, attached to the complaint states that in consideration of the withholding of action for a certain period on certain described notes including those in the present suit:

"I, Morris Baskin, for myself, my heirs, executors and administrators hereby waive the statute of limitations on all four of said notes, the said waiver being without prejudice to the assertion by me of any and all other defenses I may have to said notes, or any of them."

Witness my hand and seal hereto affixed this 23rd day of July, 1934.

/s/ Maurice Baskin (SEAL)"

It is to be noted:

First: This agreement is under seal. As to it the period of limitations is twelve years (D. C. Code, Title 24, sec. 341).

Second: The waiver is for an indefinite period and is a general unconditional waiver of "the statute of limitations in all of said notes."

An examination of the text and cases cited in the discussion of the effect of a waiver or agreement to waive the statute of limitations is found in Corpus Juris, Volume XXXVII, pages 722-724. It shows the diversity of opinion, especially in the early cases, as to the resultant legal effect.

That author after referring to these cases states:

"But the general rule is that statutes of limitations may be waived by agreement for a definite or limited time (48) or for an indefinite or unlimited time (49)."

In the discussion of cases in the notes the views of the courts in various jurisdictions are contrasted.

It was this conflict of opinion which led the Court in the case of *Mann v. Cooper*, 2 App. D. C. 226-239 to say:

"But a different question is presented by the third replication. In that, a contract founded upon a valuable consideration is alleged, for the perpetual surrender or waiver of the right to plead the statutory bar of limitations. And the question is, whether such replication, if supported by proof, would form an answer to the plea of the statutory bar of limitations, in a proceeding to revive, or to recover upon, the judgment."

"Upon this question there is a considerable conflict of authority. It is certainly true, that a party may waive the defense of the statute of limitations, as he may waive several other statutory defenses, by omitting to plead or rely upon the same, and it is difficult to see why he may not, for a valuable consideration agree to waive or abandon the defense of the statute altogether."

We believe that the law of this jurisdiction is definitely settled by this decision in *Mann v. Cooper*. It definitely places the District of Columbia among those jurisdictions holding that there is no public policy which forbids the waiver of the statute for indefinite time and has been accepted as a precedent in other jurisdictions.

In the case of *Wells Fargo & Co. v. Enright*, 127 Cal. 669, 49 L. R. A. 647, the court after citing numerous cases, including *Mann v. Cooper*, states its conclusion as follows:

"We find that they support its position. See also Wood, Limitation of Actions, #76, where it is stated that if the promise be made before the debt is barred, and in consideration of forbearance to sue, and the creditor forbears, 'It is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires, either by way of estoppel, or as a conditional promise to pay the debt in case the plaintiff proves it.' Conceding that some of the cases cited by appellant tend to support its contention, they do not convince us that there is any rule or principle of public policy violated by an agreement to waive the statute of limitations under the circumstances here disclosed. It is probably

true that after an agreement to waive the statute has been entered into, in consideration of forbearance to sue, the courts would place some limit of time beyond which the statute would not be suspended. In the case of *Kellogg vs. Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223, cited by appellant, the action was brought after forty years. Some of the cases as Mr. Wood does, place this limit within the statutory period, dating from the agreement, and this seems to be a reasonable limitation. But we are not called upon to decide, and do not decide, any further that that in our opinion the present action was brought in time."

We further believe that the present case falls within the rationale of the rule in those jurisdictions which require some time limit and that the waiver of the statute was a covenant under seal, therefore enforceable for a period of twelve years.

The courts seem to be in some disagreement as to whether an agreement founded upon an adequate consideration to waive the statute of limitations is enforceable as an agreement or as an estoppel.

This however is not so much a considered disagreement as it is apparently a loose expression of the basis for the rule. In most cases it is wholly immaterial whether an agreement not to plead the statute or waiver of the statute is enforceable as a contract or as an estoppel.

In certain cases however where the matter has been important the courts have discussed the question and where the waiver is based upon an agreement, upon an adequate consideration, usually forbearance to sue for some period, it has been held to be a matter of contract rather than an estoppel.

In *Randon v. Toby*, 11 How. 493, 13 L. Ed. 785, this question was necessary to decide because there were certain conditions attached to the waiver. The Court, referring to the agreement not to plead the statute of limitations to avoid payment of notes, said:

“This agreement, being founded on a good consideration and accepted by the plaintiff, became incorporated in the notes, and formed a part of the contract, by mutual consent. It extended the time of payment, and the statute did not begin to run till the extended time had expired. It operated also by way of estoppel in pais to a defense under the statute of limitations. Otherwise the defendant would gain an advantage by his own fraud, or put the plaintiff to an action on the agreement. On one or the other of these principles, the doctrine of estoppel has its foundation. The plea of the statute is a breach of the agreement, and, to avoid circuity of action, it may be set up in avoidance of the plea. Moreover, the stipulation in this agreement forms a new promise on good consideration to pay the money, which has always been held as a sufficient replication to the plea of the statute of limitations.”

In the case of *Shepherd v. Thompson*, 121 U. S. 231, 30 L. Ed. 1156, the question was as to the effect of an acknowledgment, or a new promise to pay, to take the case out of the statute of limitations under our local statute. The Court said:

“Although the old debt is expressly called, as it is in law, the consideration for the new agreement, this agreement, and not the old debt, is the measure of the plaintiff’s right.”

In *Freeman v. Conover*, 95 N. J. L. 89 (93), 112 Atl. 324, the Court referring to the case of *Quick v. Corlies*, 39 N. J. L. 11, said:

“The use of the word ‘estoppel’ at the end of this citation was unfortunate. What the case really decides is, that when a defendant, for a valuable consideration, agrees to waive the protection of the statute, and the agreement is acted on by his adversary, it will be recognized as valid in a court of law and will be considered as a complete answer to a plea setting up the bar of the statute. In other words the estoppel spoken of is an ‘estoppel by contract’ (assuming that the law recognizes such an estoppel) and not an ‘estoppel in pais’.”

In *Quick v. Corlies, Supra*, and in *State Trust Co. v. Sheldon*, 68 Vt. 259, 35 Atl. 177, the agreement to waive the statute was contained in the notes in suit. This was held to constitute an indefinite waiver of the right to plead the statute.

In the note to 37 C. J. 724 numerous cases are cited to the effect that—

“The statute will run against a contract to waive it (the statute of limitations) as well as against any other contract.”

In addition to cases cited see:

Bridges v. Stephens, 132 Mo. 524; 34 S. W. 555;
Dewell v. R. Co., 54 Mont. 350, 170 Pac. 753.

Judicial precedents, long established, are relied upon in matters affecting business transactions and property rights. They cannot be reversed to the prejudice of intervening rights.

This should apply with greater force when the precedent is one determining the policy of a jurisdiction in matters as to which there is a divergence of opinion in the various states.

In *Gelpcke v. Dubuke*, 1 Wall. 175, 17 L. Ed. 520 (526). In that case bonds had been issued and sold upon the faith of earlier decision of the Iowa court holding that such issues were authorized by the state constitution. The earlier decisions were reversed by the same court. The case *Gelpcke* was on writ of error to the U. S. District Court and it was contended that the Federal Courts were bound to follow the last decision of the state court.

In an illuminating opinion the Supreme Court held that a transaction based on a state law as then construed by its highest court is valid although the court reversed itself in subsequent cases.

The court said:

“However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. ‘The sound and true rule is, that if the contract,

when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.' *Ohio Life & Trust Co. v. Debolt*, 16 How., 432.

The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

Point Three.

The allegations of defendant's pleas were not admissible in the hearing of the motion for judgment.

Rule 7, Rules of Civil Procedure, limits the pleadings in a case of this character to a complaint and an answer. Each is signed only by counsel and is unverified.

Under rule 56 affidavits may be filed. The allegations of the plea are automatically an issue for trial. It could only be possible in this case, where no affidavits were filed, to consider the facts stated in the complaint, and which may be regarded as admissions against interest.

We believe, for the reasons stated, the decision of the District Court should be reversed.

Respectfully submitted,

WILLIAM E. RICHARDSON,
Attorney for Appellants.

APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

No. 8058.

F. REGIS NOEL, OTTO G. VAN SENDEN, AND
CHARLES J. SHELLHORN, TRUSTEES, *Appellants*,

v.

MAURICE BASKIN, *Appellee*.

Appeal from the District Court of the United States
for the District of Columbia

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United States Court of Appeals

a District Court of the United States
for the District of Columbia

Civil Action No. 5521.

F. REGIS NOEL, ET AL., Trustees, *Plaintiffs*,

v.

MAURICE BASKIN, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled action, to wit:

1 *Complaint (Promissory Notes)*

1. The plaintiffs, F. Regis Noel, Otto G. Van Senden and Charles J. Shellhorn, were appointed trustees in Equity Cause No. 62,638, in this Court, on the 15th day of November, 1939, to receive, collect and liquidate all of the remaining assets of the estate of Herman W. Van Senden, Administration No. 39,451, in this Court, and have heretofore duly qualified by giving bonds ordered by the Court and by receipting for and taking over all of the remaining assets of said estate.

2. The matter on controversy in this suit exceeds, exclusive of interest and costs, the sum of One Thousand Dollars (\$1,000.00).

3. Upon, to wit, the first day of September, 1924, the defendant, Maurice Baskin, executed three certain promissory notes, bearing said date, to the order of John B. Davis,

payable on or before eight (8) years after date, with interest at the rate of six percentum (6%) per annum until paid, said interest payable quarterly, annually and at maturity, if then not paid, at the rate aforesaid, viz. six percentum (6%) per annum, said notes being respectively, No. 101, for the sum of One Thousand Dollars (\$1,000.00), No. 119, for the sum of Five Thousand Dollars (\$5,000.00), No. 120 for the sum of Five Thousand Dollars (\$5,000.00), all of

2 said notes purporting to be secured by Deed of Trust on Lots numbered 105 to 109, Square 2868, in the City of Washington, in the District of Columbia, Algernon S. Gardiner and Moses J. Wright, Trustees. Said Deed of Trust securing said notes was a third Deed of Trust on said land and improvements, the first Deed of Trust being then in the sum of, to wit, Eight Hundred and Fifty Thousand Dollars (\$850,000) and the second Deed of Trust in the sum of, to wit, Sixty Thousand Dollars (\$60,000).

4. Payee, John B. Davis, prior to the due date, and for good and valuable consideration endorsed said notes, without recourse, to Herman W. Van Senden, and they became, at his death, assets of his said estate, which was partially administered in this Court by Jesse M. Van Senden, his widow, Otto G. Van Senden, his brother, and National Savings and Trust Company.

5. Copies of said notes are set forth herewith, marked plaintiffs' exhibits A, B and C. None of the principal of said notes was ever paid and interest, duly credited, was paid until March 1, 1931, but not thereafter.

6. At sometime prior to March 3, 1934, the first Deed of Trust on said Lots numbered 105 to 109, in Square 2868, was foreclosed and sold by the owners of the said First Deed of Trust thereon. The proceeds of said foreclosure sale under said first Deed of Trust did not exceed the amount due under said first Deed of Trust. The notes in suit here then became and ever since have been a liability over of the defendant, Maurice Baskin.

7. Under date of July 23, 1934, the said defendant, Maurice Baskin, by his certain written instrument under seal, for and in consideration of the above mentioned administrators of the estate of Herman W. Van Senden, deceased, withholding action or suit until after September 2, 1934, which they did, on the above described notes, which are set forth fully in plaintiffs' exhibits A, B and C then held by said administrators and now held by your plaintiffs as a remaining part of the estate of the decedent, Herman W. Van Senden, for himself, his heirs, executors and administrators, waived the statute of limitations on all three above mentioned notes, said waiver being without
 3 prejudice to the assertion by him of any and all other defenses he then may have had to said notes or any of them. Copy of said waiver is set forth herewith and marked plaintiffs' exhibit D.

Said Maurice Baskin, since above mentioned foreclosure and sale has paid none of the principal or interest on said notes, and there is now due and owing to the plaintiffs, trustees as aforesaid, the principal sum of Eleven Thousand Dollars (\$11,000), and interest at six per centum (6%) per annum, compounded quarterly, on said principal sum; wherefore, plaintiffs, as trustees of the remainder of the estate of Herman W. Van Senden, as aforesaid, bring this suit, and demand judgment against defendant for the sum of Eleven Thousand Dollars (\$11,000), interest at six per centum (6%) per annum, from March 12th, 1931, on said principal sum, compounded quarterly, and their costs herein.

F. REGIS NOEL

Attorney for Trustees

National Savings and Trust Building

4

Bill of Particulars

Copy of Notes

EXHIBITS A, B AND C

REALTY APPRAISAL AND TITLE COMPANY
1416 F STREET N. W., WASHINGTON, D. C.

SECURED BY DEED OF TRUST ON LOT. 105 to 109 — SQUARE — 2862
TO Algernon S. Gardiner — AND — Moses J. Wright — TRUSTEES

\$1000.00

WASHINGTON, D. C. 1924

"On or before"
Eight years

AFTER DATE, FOR VALUE RECEIVED,

1

PROMISE TO PAY TO THE ORDER OF

John B. Davis

One Thousand and no/100

DOLLARS.

WITH INTEREST AT THE RATE OF six — PER CENTUM PER ANNUM UNTIL PAID;
SAID INTEREST PAYABLE quarter annually and at maturity;
EACH INSTALLMENT OF INTEREST TO BEAR INTEREST AFTER MATURITY, IF NOT
THEN PAID, AT THE RATE AFORESAID. Principal and interest payable at

Central Trust Company of Maryland, Frederick, Maryland

This is to certify that this is note 101 of
the note described in a Deed of Trust to the
Trustees named herein; and bearing even date
herewith. Said Deed of Trust and note having
been executed in my presence.

Comm. 11/1/24
Notary Public

NO. 101

(RETAIN THIS NOTE AFTER PAYMENT UNTIL RELEASE IS OBTAINED)

Cassius B. Pool
Maurice Barker
10 2113 1/2 St. N. W.
Frederick Md.



Payable _____ day

WITHOUT RECOURSE TO

*John B. Barnes*CREDIT OF
H. W. VAN SENDEN

DEC 23 1929 Int. Paid To DEC 1 - 1929

APR 18 1930 Int. Paid To MAR 1 - 1930

OCT 13 1930 Int. Paid To SEP 1 1930

DEC 6 - 1930 INT. PAID TO DEC 1 1930

MAR 12 1931 INT. PAID TO MAR 1 - 1931

WITHOUT RECOURSE, AND WITHOUT
WARRANTY IN ANY EVENT.*James M. Van Senden*
Otto Van Senden

NATIONAL SAVINGS AND TRUST COMPANY.

By *[Signature]*President and Trust Officer,
Administrator of the Estate of

INCORPORATION ON INTEREST

June 8 1924	\$ 15.00	June 1 1924
June 1 1925	\$ 15.00	June 1 1925
June 3 1925	\$ 15.00	June 1 1925
June 1 1925	\$ 15.00	June 1 1925
June 4 1925	\$ 15.00	June 1 1925
June 1 1926	\$ 15.00	June 1 1926
June 10 1926	\$ 15.00	June 1 1926
June 1 1926	\$ 15.00	June 1 1926
June 2 1926	\$ 15.00	June 1 1926
June 14 1927	\$ 15.00	June 1 1927

Interest paid to June 1 1927

SEP 27 1927 Int. Paid To SEP 1 - 1927

DEC 10 1927 Int. Paid To DEC 1 1927

MAR 10 1928 Int. Paid To MAR 1 1928

JUN 16 1928 Int. Paid To JUN 1 1928

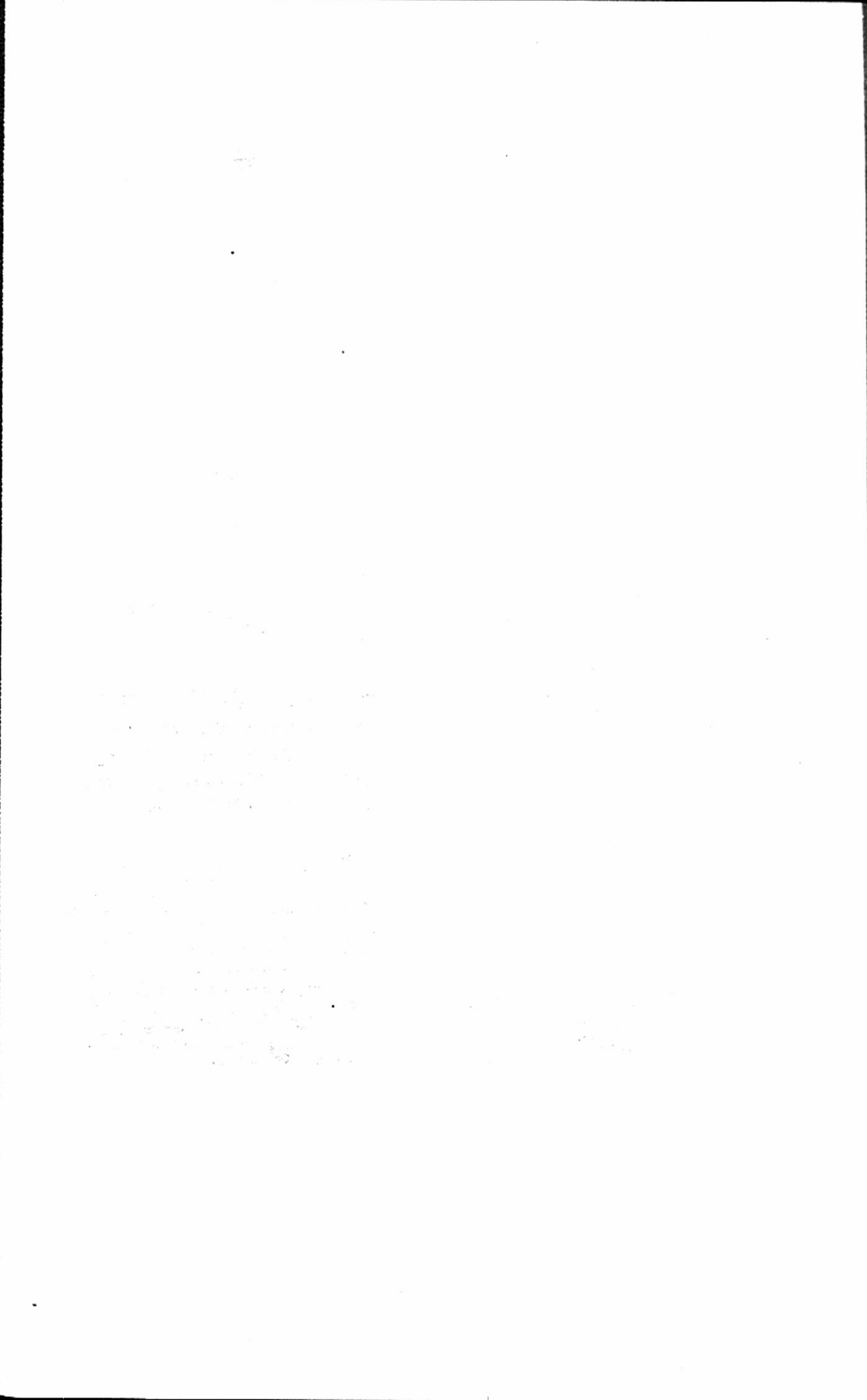
SEP 14 1928 Int. Paid To SEP 1 1928

DEC 14 1928 Int. Paid To DEC 1 - 1928

APR 3 1929 Int. Paid To MAR 1 - 1929

JUL 8 - 1929 Int. Paid To JUN 1 1929

SEP 20 1929 Int. Paid To SEP 1 - 1929



REALTY APPRAISAL AND TITLE COMPANY

1416 F STREET N. W., WASHINGTON, D. C.

SECURED BY DEED OF TRUST ON LOT# 105 to 109 — SQUARE 2868 —

TO — Algernon S. Gardiner — AND — Moses J. Wright — TRUSTEES

\$5000.00 —

WASHINGTON, D. C., September 1st — 1924

"On or before"

Eight years —

AFTER DATE, FOR VALUE RECEIVED.

I —

PROMISE TO PAY TO THE ORDER OF

John B. Davis —

Five Thousand and no/100 —

DOLLARS.

WITH INTEREST AT THE RATE OF SIX — PER CENTUM PER ANNUM UNTIL PAID;

SAID INTEREST PAYABLE quarter annually and at maturity —

EACH INSTALLMENT OF INTEREST TO BEAR INTEREST AFTER MATURITY, IF NOT

THEN PAID, AT THE RATE AFORESAID. Principal and interest payable at

Central Trust Company of Maryland, Frederick, Maryland. —

This is to certify that this is note 119 of

the notes described in a Deed of Trust to the
Trustees named herein; and bearing even date
herewith. Said Deed of Trust and note having
been secured in my presence.

Maurice Beakins
Notary Public.

Maurice Beakins

Sept 1, 1924

NO. 119 —

RETAIN THIS NOTE AFTER PAYMENT UNTIL RELEASE IS OBTAINED

INTEREST ENDORSEMENT

Dec. 4 1924 \$... to Dec. 1 1924
 Mar. 6 1925 \$... to Mar. 1 1925
 Jun. 3 1925 \$... to Jun. 1 1925
 Sept. 1 1925 \$... to Sept. 1 1925
 Dec. 2 1925 \$... to Dec. 1 1925
 Mar. 6 1926 \$... to Mar. 1 1926

INTEREST ENDORSEMENT

June 10 1926 \$... to June 1 1926
 Sept. 9 1926 \$... to Sept. 8 1926
 Dec. 6 1926 \$... to Dec. 1 1926
 Mar. 2 1927 \$... to Mar. 1 1927
 Interest paid to June 1 1927

SEP 27 1927 Int. Paid To SEP 1 - 1927

DEC 10 1927 Int. Paid To DEC 1 1927

MAR 16 1928 Int. Paid To MAR 1 1928

JUN 16 1928 Int. Paid To JUN 1 1928

DEC 17 1928 Int. Paid To DEC 1 - 1928

APR 3 1929 Int. Paid To MAR 1 - 1929

JUL 8 - 1929 Int. Paid To JUN 1 1929

SEP 20 1929 Int. Paid To SEP 1 - 1929

DEC 23 1929 Int. Paid To DEC 1 - 1929

APR 18 1930 Int. Paid To MAR 1 - 1930

MAY 10 1930 Int. Paid To JUN 1 - 1930

OCT 13 1930 Int. Paid To SEP 1 1930

DEC 6 - 1930 Int. Paid To DEC 1 1930

MAR 12 1931 Int. Paid To MAR 1 - 1931

\$.....

Payable..... on..... day

WITHOUT RECOURSE TO

John B. Davis

CREDIT OF
H. W. VAN SENDEN

WITHOUT RECOURSE AND WITHOUT
WARRANTY IN ANY EVENT.

Jessie M. Van Senden
Attorney General

NATIONAL SAVINGS AND TRUST COMPANY,

By

W. H. Davis
 Vice President and Trust Officer.

Administrators of the Estate of
 Herman W. Van Senden, deceased.

REALTY APPRAISAL AND TITLE COMPANY
1416 F STREET N. W., WASHINGTON, D. C.

SECURED BY DEED OF TRUST ON LOT # 105 to 109 — SQUARE 2868

TO Algernon S. Gardiner — AND — Moses J. Wright — TRUSTEES

\$5000.00 —

WASHINGTON, D. C. — September 1st — 1924.

"On or before"

Eight years

AFTER DATE, FOR VALUE RECEIVED,

I —

PROMISE TO PAY TO THE ORDER OF

John B. Davis

Five Thousand and no/100

DOLLARS,

WITH INTEREST AT THE RATE OF SIX — PER CENTUM PER ANNUM UNTIL PAID;

SAID INTEREST PAYABLE quarterly annually and at maturity

EACH INSTALLMENT OF INTEREST TO BEAR INTEREST AFTER MATURITY, IF NOT

THEN PAID, AT THE RATE AFORESAID. Principal and interest payable at

Central Trust Company of Maryland, Frederick, Maryland.

This is to certify that this is note 120 of

the note described in a Deed of Trust to the
Trustees named herein; and bearing even date
herewith. Said Deed of Trust and note having
been presented in my presence.

Charles M. Reed
Notary Public.

Maurice Barkin

Rec'd Sept 1, 1924

NO. 120 —

RETAIN THIS NOTE AFTER PAYMENT UNTIL RELEASE IS OBTAINED

INTEREST ENDORSEMENT

Dec 14 1924 \$... to Dec 1 1924
 Mar 6 1925 \$... to Mar 1 1925
 Jun 2 1925 \$... to Jun 1 1925
 Sept 1 1925 \$... to Sept 1 1925
 Dec 2 1925 \$... to Dec 1 1925
 Mar 6 1926 \$... to Mar 1 1926
 Jun 10 1926 \$... to Jun 1 1926
 Sept 9 1926 \$... to Sept 1 1926
 Dec 6 1926 \$... to Dec 1 1926
 Mar 8 1927 \$... to Mar 1 1927
 Interest paid to June 1 1927

SEP 27 1927 Int. Paid To SEP 1 - 1927

DEC 10 1927 Int. Paid To DEC 1 1927

MAR 16 1928 Int. Paid To MAR 1 1928

JUN 16 1928 Int. Paid To JUN 1 1928

SEP 14 1928 Int. Paid To SEP 1 1928

DEC 17 1928 Int. Paid To DEC 1 - 1928

APR 3 1929 Int. Paid To MAR 1 - 1929

JUL 8 - 1929 Int. Paid To JUN 1 1929

SEP 20 1929 Int. Paid To SEP 1 - 1929

DEC 23 1929 Int. Paid To DEC 1 - 1929

APR 18 1930 Int. Paid To MAR 1 - 1930

JUL 10 1930 Int. Paid To JUN 1 - 1930

OCT 13 1930 Int. Paid To SEP 1 1930

DEC 8 - 1930 INT. PAID TO DEC 1 1930

MAR 12 1931 INT. PAID TO MAR 1 - 1931

WITHOUT RECOURSE TO

John A. Davis

CREDIT OF
H. W. VAN SENDENWITHOUT RECOURSE AND WITHOUT
WARRANTY IN ANY EVENT.
 Jessie M. Van Senden
 Otto L. Van Senden
NATIONAL SAVINGS AND TRUST COMPANY,
By

Vice President and Trust Officer.

Administrators of the Estate of
Norman W. Van Senden, deceased.

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOSEPH NEALE
OF THE BOSTON BAR
IN TWO VOLUMES
VOL. II.
BOSTON: PUBLISHED BY
J. NEALE, AT THE
CITY OF BOSTON, 1825.

Exhibit "D"

Know All Men by These Presents, That I, Maurice Baskin, of the City of Washington, District of Columbia, for and in consideration of Jessie M. Van Senden, Otto G. Van Senden, and National Savings and Trust Company, Administrators of the estate of Herman W. Van Senden, deceased, withholding action or suit until after September 2, 1935 on the following described notes, held by said Administrators as a part of the estate of said decedent, viz.:

Notes numbered, 101 for \$1,000.00, 119 for \$5,000.00, and 120 for \$5,000.00, all dated September 1, 1924, payable on or before eight years after date to the order of John B. Davis, signed by me as maker, endorsed by John B. Davis, and secured by deed of trust on Lots 105 to 109 in Square 2868; and note numbered 246 dated September 1, 1924, payable on or before eight years after date to my order for \$5,000.00, signed by Joseph H. Rose, as maker, endorsed by me, and secured by deed of trust on Lots 105 to 109 in Square 2868; all four of which notes bear interest at the rate of six percent per annum until paid.

I, Morris Baskin, for myself, my heirs, executors and administrators hereby waive the statute of limitations on all four of said notes, the said waiver being without prejudice to the assertion by me of any and all other defenses I may have to said notes, or any of them.

Witness my hand and seal hereto affixed this 23rd day of July, 1934.

(s) MAURICE BASKIN (Seal)

*Answer of Defendant to Complaint**First Defense*

1. The defendant is without knowledge or information sufficient to form a belief that the plaintiffs, F. Regis Noel, Otto G. Van Senden and Charles J. Shellhorn, have as trustees, in the capacity in which they sue, succeeded to the interest of the late Herman W. Van Senden and the admin-

istrator of his estate as owner and holder of the three promissory notes upon which suit is brought.

Second Defense

2. The defendant denies that the endorsement by John B. Davis on said notes was to Herman W. Van Senden, and avers it was in blank; defendant avers said notes were first owned and held by Emory L. Coblentz and while they were so owned and held the events in the next paragraph described occurred; that thereafter such title to said notes as was in Herman W. Van Senden was derived by him directly or by mesne transfers from said Emory L. Coblentz; defendant is without knowledge or information sufficient to form a belief as to whether said transfer or transfers were while any interest installment was overdue and for what, if any, lawful consideration; defendant denies, however, that said Herman W. Van Senden was a bona fide holder in due course without notice.

3. That the notes here sued on were given by this defendant to one Emory L. Coblentz as a part of the purchase price of two large apartment properties in the City of Washington, District of Columbia, including that known as Clifton Terrace, which defendant bought from said
14 Coblentz on or about September 1, 1924, subject to first and second deeds of trust, and paid therefor in cash and by third deed of trust notes in the aggregate amount of approximately \$700,000, of which the notes sued on were a part. That the payee of the said notes, John B. Davis, was a nominee of said Emory L. Coblentz and had no ownership in the said notes. That as between this defendant and said Coblentz the personal responsibility of this defendant on said notes was not relied on, nor was it an essential of said transaction, and said notes were given to evidence the ownership and amount of a third trust lien on the said property; that the said notes were all payable as to principal and interest at the Central Trust Company of Maryland, located at Frederick, Maryland, of which the

said Emory L. Coblentz was president; that upon taking possession of the aforesaid Clifton Terrace Apartments the defendant discovered that material representations which had been made to this defendant by the said Coblentz and his agents as to the revenues and value of the said properties were not true; that the defendant brought said misrepresentations to the attention of the said Coblentz who by way of partial redress therefor released the defendant from personal liability on said third trust notes.

Third Defense

4. The defendant re-alleges by reference the allegations contained in the second defense hereto, and avers that the defendant caused said Clifton Terrace Apartments to be transferred to the American Realty and Improvement Company, a corporation of which he was president, and for a period of more than six years operated said property, during which time there was paid pursuant to the terms of the original purchase and by way of payments on the trusts thereon the sum of \$300,000; that in February, 1931, there was litigation and controversy concerning the said property between said Maurice Baskin and Emory L. Coblentz

and corporations controlled by him, holders of third
15 trust notes of the aforesaid issue, and said controversy was such as to threaten the security of the said third trust, and said controversy was settled by contracts of February 18, 1931, whereby, among other things, the defendant agreed to cause the transfer of the title of the said American Realty and Improvement Company in said Clifton Terrace Apartments to said Emory L. Coblentz, as trustee acting for all of the third trust noteholders, and to deliver possession of said property and the right to collect the revenues therefrom to said Emory L. Coblentz, as trustee as aforesaid, in full accord and satisfaction of any liability defendant might have on said notes, and whereby the said Emory L. Coblentz, as trustee as aforesaid, agreed to accept said transfer and delivery in full of all liability on said notes as aforesaid; and said contract

was carried out immediately thereupon; that the then owners and holders of the notes now sued on, who, this defendant is informed and believes and therefore avers, were the administrators of the estate of Herman W. Van Senden, deceased, with knowledge of the aforesaid transaction between this defendant and said Emory L. Coblentz, as trustee, accepted funds derived after said transfer and delivery from the operation of the said Clifton Terrace Apartments by said Emory L. Coblentz, as trustee, and either had expressly authorized or thereby confirmed the contract aforesaid whereby said transfer and delivery was accepted in full of this defendant's liability on said third trust notes.

Fourth Defense

5. That the amounts sued for on the notes sued on came due according to their terms as follows: Quarterly interest on June 1, 1931, and quarterly thereafter, and principal on September 1, 1932. The title conveyed to the trustees under the aforesaid third trust securing said notes had been lost by foreclosure of the first trust in December, 1931, ten months after the title and possession had been conveyed and transferred as set forth in paragraph 4 hereof to said Emory L. Coblentz as trustee for all said third trust

16 noteholders; no claim was made on the defendant by any holder of a note of said trust issue until March, 1934, when claim was made by the administrators of Herman W. Van Senden on the three notes here in suit and one other of said third trust notes, whereupon the defendant denied personal liability on any of said third trust notes on the ground of defendant's transactions aforesaid with said Emory L. Coblentz acting for all said third trust noteholders, and when said administrators persisted in their demands and threatened suit, this defendant requested that suit be deferred until the possibility of other claims by other noteholders should be eliminated by the expiration of the period fixed by the statute of limitations for the bringing of suit for the principal debt should expire, to wit, September 1, 1935, and offered on May 28, 1934, if said ad-

ministrators would defer action until September, 1935, to agree in such case that the running of the statute of limitations should cease from that date until September 2, 1935; this offer was accepted by said administrators, and to carry the arrangement so agreed to into effect the waiver attached to the complaint was drafted by said administrators' attorney and executed and delivered by defendant; that shortly after September 2, 1935, when action could be brought on said notes conformably to said waiver agreement, demand thereon was made again by said administrators, and no new promise, acknowledgment, part payment or waiver has since said waiver of July 23, 1934, been made, nor was suit brought until this action was commenced, wherefore the defendant says this suit was not brought within three years of the time when the claimed right of action accrued, and the defendant pleads the statute of limitations.

Fifth Defense

6. That the plaintiffs are estopped and barred from asserting this claim against the defendant by their conduct and laches and the conduct and laches of the administrators of the estate of Herman W. Van Senden, deceased, as follows:

17 In February, 1931, when the defendant parted with title and possession of said Clifton Terrace Apartments to said Emory L. Coblentz, as set out in the third defense above stated, the defendant relied on his representation, and the concurrence of two investment corporations controlled by him in the representation, that he could act for and bind the holders of all notes secured by said third trust, excepting those notes of said issue held and controlled by this defendant; the administrators of Herman W. Van Senden, deceased, knew of said representations and that this defendant was about to or had parted with title and possession of said apartments in reliance thereon; said administrators accepted benefits of said transaction by way of proceeds of operation while said title and possession was in said Coblentz; when interest came due thereafter according to said notes, June 1, September 1, and December 1, 1931, said administrators refrained from mak-

ing any demand on this defendant, giving thereby the appearance of acquiescence in the release of this defendant granted by said Coblentz in behalf of all noteholders; that this defendant, lulled into a sense of security, took no action while the title which had been so conveyed to said Coblentz and the title of the trustees of said third trust was lost in December, 1931, while the property and its revenues were controlled by said Coblentz and as a result of negligence and malfeasance on the part of said Coblentz and his agents; when interest came due quarterly thereafter and the principal became due, according to the face of said notes, September 1, 1932, said administrators continued to refrain from making any demand on the defendant, continuing to give the appearance as aforesaid of acquiescence in the release granted by said Coblentz on behalf of all noteholders, until March, 1934; meanwhile said Coblentz, who was in February, 1931, a principal owner and in control of said Central Trust Company of Maryland, of Frederick, Maryland, and a chain of other banks in Maryland and Pennsylvania, and generally a man of wealth and in control of wealth, became impoverished and his banks and said investment corporations went into bankruptcy, which

18 events occurred before February, 1934, when said administrators first claimed that defendant was personally liable on said notes, so that defendant believing and reasonably being led to believe by the conduct of all holders of said third trust notes, including said administrators, that no personal liability on the part of defendant would be asserted, relied on said belief so induced and thereby lost opportunities to protect himself and to recoup any loss which he might suffer by reason of the assertion of personal liability on said notes against him; wherefore defendant is advised plaintiffs are estopped and barred from prosecuting their present claim.

PAUL E. LESH

Attorney for Defendant
1422 F Street, N. W.
Washington, D. C.

I hereby certify that I have this 7th day of March, 1940, mailed postpaid a copy of the foregoing answer to F. Regis Noel, attorney for plaintiffs herein, at National Savings and Trust Building.

PAUL E. LESH.

19 *Motion of Defendant for Judgment on the Pleadings*

Comes now the defendant in the above-entitled action, by his attorney, and moves for judgment in his favor on the pleadings, and for grounds of this motion says that it appears from the face of the complaint and the fourth defense of the answer herein that said action was not commenced within the time limited by law.

PAUL E. LESH,
Attorney for Defendant,
 1422 F Street, N. W.,
 Washington, D. C.

Service of the above motion and points and authorities in support, and copies, acknowledged this 15th day of May, 1941.

WM. E. RICHARDSON
 By W. M. BASTIAN

20 *Memorandum (By the Court)*

In this action the plaintiffs seek to recover judgment on three promissory notes executed by the defendant September 1, 1924, maturing eight years after date, bearing interest, and in the aggregate principal amount of \$11,000, said notes being part of an issue of notes in the aggregate principal amount of approximately \$700,000, secured by a deed of trust subordinate to a first deed of trust securing indebtedness in the amount of \$850,000 and a second deed of trust securing indebtedness in an amount of \$60,000. At some time prior to March 3, 1934, the first deed of trust was foreclosed, and the proceeds of the sale thereunder did not exceed the amount due under the first deed of trust. It

is alleged that the notes in suit were the property of Herman W. Van Senden and, upon his death, became assets of his estate, which was partially administered by Jessie M. Van Senden, his widow, Otto G. Van Senden, his brother, and National Savings and Trust Company, as administrators. Subsequently, in appropriate proceedings, F. Regis Noel, Otto G. Van Senden and Charles J. Shellhorn were appointed trustees to receive, collect and liquidate all of the remaining assets of the estate of Herman W. Van Senden. It is alleged in the complaint that, by a written instrument, dated July 23, 1934, which is attached thereto, the defendant, in consideration of the withholding of action or suit on said notes until after September 2, 1935, by Jessie M. Van Senden, Otto Van Senden and National Savings and Trust Company, as administrators of the estate of Herman W. Van Senden, deceased, that the said defendant waived the statute of limitations on all three notes now in suit, said waiver being without prejudice to the assertion by him of any and all other defenses he then may have had to said notes.

21 The defendant filed an answer setting up five defenses. The plaintiffs moved to strike certain portions of said answer, including all of the fourth defense. This motion was denied by this Court, acting through Mr. Justice O'Donoghue. The matter is now before the Court on a motion by the defendant for judgment on the pleadings on the ground that it appears from the face of the complaint and the fourth defense of the answer herein that this action was not commenced within the time limited by law. It is alleged in the fourth defense that no claim was made on the defendant by the holder of any note of the issue of which the notes in suit are a part until March, 1934, when claim was made by the administrators of Herman W. Van Senden on the three notes here in suit, whereupon the defendant denied personal liability on any of said third trust notes upon certain grounds which it is not necessary in the present connection to discuss. It is further stated in said defense:

“* * * when said administrators persisted in their demands and threatened suit, this defendant requested that suit be deferred until the possibility of other claims by other noteholders should be eliminated by the expiration of the period fixed by the statute of limitations for the bringing of suit for the principal debt should expire, to wit, September 1, 1935, and offered on May 28, 1934, if said administrators would defer action until September, 1935, to agree in such case that the running of the statute of limitations should cease from that date until September 2, 1935; this offer was accepted by said administrators, and to carry the arrangement so agreed to into effect the waiver attached to the complaint was drafted by said administrators' attorney and executed and delivered by defendant; that shortly after September 2, 1935, when action could be brought on said notes conformably to said waiver agreement, demand thereon was made again by said administrators, and no new promise, acknowledgment, part payment or waiver has since said waiver of July 23, 1934, been made, nor was suit brought until this action was commenced, wherefore the defendant says this suit was not brought within three years of the time when the claimed right of action accrued, and the defendant pleads the statute of limitations.”

This action was instituted January 22, 1940.

The single question here to be determined is whether or not, by the agreement of July 23, 1934, the defendant is now precluded from pleading as a defense the statute of limitations. If that agreement, fairly construed, has the meaning ascribed to it by the allegations of the fourth defense, judgment should be rendered on the pleadings for the defendant. If the agreement, fairly construed, is a

22 perpetual bar to the pleading of the statute of limitations, or if, by such agreement, the defendant is precluded from pleading the statute of limitations for a period of twelve years from the date of such agreement, as is contended by the plaintiffs, by reason of said agreement being under seal, judgment on the pleadings should not be rendered in favor of the defendant.

While there is a substantial conflict among the various jurisdictions as to whether or not a waiver in perpetuity of the statute of limitations is valid upon considerations of public policy, until authoritative statement is made to the contrary, it must be considered that in this jurisdiction such an agreement is valid. In *Mann v. Cooper*, 2 App. D. C. 226, our Court of Appeals held that, in a proceeding for *scire facias* to revive a judgment, a plea of the statute of limitations will not be permitted "where a contract founded upon a valuable consideration is alleged for the perpetual surrender or waiver of the right to plead the statutory bar of limitations." There the Court stated, at page 238:

"It is certainly true, however, that a party may waive the defense of the statute of limitations, as he may waive several other statutory defenses, by omitting to plead or rely upon the same, and it is difficult to see why he may not, for a valuable consideration, agree to waive or abandon the defense of the statute altogether."

When the same case (*sub nomine Mann v. McDonald*, 6 App. D. C. 548) came before the Court again upon pleadings which set forth the contract claimed to have constituted a perpetual bar to the right to plead the statute of limitations, it was determined that such contract had to do with matters other than the defense of the statute of limitations, and it was not contemplated by the parties that it should affect that right at all. I cannot, therefore, conclude that the authority of the first case was impaired by the holding in the second one.

It is now generally recognized that statutes of limitations give effect to a sound public policy against the litigation of stale demands, and while, as stated, an agreement to perpetually surrender the right to assert such defense would in the present state of the law in this jurisdiction be valid and constitute an estoppel against the assertion of such defense, such an agreement is not to be construed as having that meaning unless from it such meaning clearly appears. The weight of authority seems to be that ordinarily the waiver of the right to invoke the stat-

ute of limitations, or action which constitutes an estoppel to assert such defense, should have that effect for a fixed period where such period can be fixed by the terms of the agreement, or the acts of the parties, and, where it is indefinite and cannot be so fixed, then for a reasonable period. A reasonable period, in the absence of acts of the parties to the contrary, would be a period equivalent to the statutory period of limitations, commencing when conformable to the agreement the suit could be instituted. Under the agreement here in question, such action could have been instituted on September 3, 1935, and the statute of limitations would fix a period until September 3, 1938, within which to institute such action. The defendant asserts that this was the agreement made between the parties and, in the absence of provisions inconsistent therewith, which do not appear in the agreement, such is a fair construction of its meaning.

The contention of the plaintiffs that the period during which the defendant could not assert the defense of the statute of limitations is twelve years proceeds from a wrong premise. Where a right of action arises from an instrument under seal, that action is not barred by the statute of limitations for a period of twelve years; and, if the pleading of the statute of limitations here is a breach of the agreement made under seal, the right to maintain an action for such breach could be asserted at any time within a period of twelve years from such breach; or, to avoid circuitry of action, such agreement could within such period be asserted, as it has been here, without being vulnerable to the charge that its assertion is itself barred by the statute of limitations. But neither of those characteristics help in the determination of what the provisions of the agreement itself mean, what period of waiver was intended, in short, whether or not there has been a breach of the agreement by the filing of the defense of the statute of limitations in this action on the 7th day of March, 1940. It would be different

if the agreement under seal was itself a promise to
 24 pay the indebtedness, but clearly it is not. Its very

terms contemplate a refusal of the defendant to pay the debt.

In this view of the matter, I must conclude that the agreement of July 23, 1934, does not preclude the defendant from asserting the defense of the statute of limitations in an action instituted January 22, 1940, and, therefore, that judgment should be entered on the pleadings in favor of the defendant. This view further seems to me to be in accord and consistent with the action of this Court in refusing to strike this defense when, from the memoranda in the files, it appears much the same contentions were made as have been here considered.

Judgment for the defendant will accordingly be entered.

JAS. W. MORRIS

Justice.

July 12, 1941.

25

Judgment for Defendant.

This case came on to be heard on the motion for judgment on the pleadings filed herein May 16, 1941, by the defendant, and was argued by counsel for the defendant and plaintiffs, and considered by the Court, and the Court having on July 12, 1941, filed a memorandum directing entry of judgment for the defendant, it is by the Court this 1st day of August, 1941,

Ordered that judgment be entered for the defendant herein, with costs.

J. W. MORRIS

Justice.

Copy received July 14, 1941 William E. Richardson,
Atty. for Plaintiffs.

26 In the District Court of the United States
for the District of Columbia

Civil No. 5521

F. REGIS NOEL, CHARLES J. SHELLHORN AND OTTO G. VAN
SENDEN, *Plaintiffs*

v.

MAURICE BASKIN, *Defendant.*

Notice of Appeal

Notice is hereby given this 22d day of August, 1941, that above named plaintiffs hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 1st day of August, 1941 in favor of Maurice Baskin, defendant against said plaintiffs.

WM. E. RICHARDSON,
Attorney for plaintiffs,
National Press Building,
Washington, D. C.

Memorandum

September 12 1941

Cost bond (\$250.00) on appeal of plaintiffs filed.

27 In the District Court of the United States
for the District of Columbia

No. 5521

F. REGIS NOEL, ET AL., Trustees, *Plaintiffs*

v.

MAURICE BASKIN, *Defendant.*

Designation of Record on Appeals

Plaintiffs hereby designate the following pleadings and records to be included in preparing the transcript of record for appeal in the above entitled case:

1. Complaint
2. Defendant's pleas
3. Defendant's motion for summary judgment

4. Opinion of the Court on consideration of foregoing motion

5. Order granting motion and dismissing complaint entered August 1, 1941.

6. Notice of appeal filed August 22, 1941

7. Notation of approval of bond on appeal

8. This designation of record.

WM. E. RICHARDSON,
Attorney for Plaintiffs.

Copy mailed to Paul E. Lesh, Esq., Atty. for Defendant, 1420 F St. N. W. Sept. 12, 1941.

WM. E. RICHARDSON,
Atty. for Plfts.

28 District Court of the United States
 for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 27, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Civil Action No. 5521, wherein F. Regis Noel, et al., Trustees, are Plaintiffs and Maurice Baskin is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of October, 1941.

C. E. STEWART,
Clerk.

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8058

F. REGIS NOEL, OTTO G. VAN SENDEN AND
CHARLES J. SHELLHORN, TRUSTEES, *Appellants*,

v.

MAURICE BASKIN.

CLERK

PAUL E. LESH,
Attorney for Appellee.

JOSEPH LOW,
LESH, DRAIN & BARNARD,
Of Counsel.

February 14, 1942.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8058

F. REGIS NOEL, OTTO G. VAN SENDEN AND
CHARLES J. SHELLHORN, TRUSTEES, *Appellants*,

v.

MAURICE BASKIN.

BRIEF FOR APPELLEE.

STATEMENT.

This suit was brought January 22, 1940, on notes given in a real estate transaction of 1924, dated September 1, 1924, which matured September 1, 1932, and on which interest was due quarterly and unpaid after March 31, 1931 (Appellants' App. 1 to 10).

Among other defenses going to the merits and involving stale transactions, corporations long since defunct and persons since deceased, the fourth defense (Appellants' App. 14) was the three-year Statute of Limitations. Motion for summary judgment on this defense was granted (Id. 22).

The plaintiffs relied upon a waiver of the Statute made July 23, 1934 (Id. 11). The controlling question here to be decided is the construction and effect of this waiver.

SUMMARY OF ARGUMENT.

1. The Statute of Limitations was properly invoked by answer.

2. Except for the waiver the period within which suit could be brought on the notes would have expired September 1, 1935.

3. The waiver operated to extend the period within which suit could be brought on the notes for three years from September 2, 1935. Even assuming that there may be a perpetual waiver, when so intended and expressed, the waiver here cannot be so construed.

4. The fact that the waiver was under seal does not affect its construction, hence does not affect its operation.

5. The trial justice did not and this court need not consider any facts not appearing in the complaint to determine that the suit is barred by limitations.

ARGUMENT.

1. The Statute of Limitations Was Properly Invoked by Answer.

The Appellants raised no question in the Court below but that appropriate procedural foundation had been laid for the disposition of the case on the plea of the Statute of Limitations which, in turn, depended upon the effect to be given to the waiver of July 23, 1934.

In this Court it is suggested rather than argued that there is some procedural objection to the disposition of the case upon the defense of the Statute invoked by paragraph 5 of the answer, the "Fourth Defense" (Appellants' App. 14).

Thus appellants say that the "pleas are not regarded by us as material to the issues on appeal" (Brief p. 3).

Our position in this regard is that it was proper, perhaps indispensable, to interpose the defense of the Statute of

Limitations by including the equivalent of a plea of the Statute in the answer.

In *French v. District Title Ins. Co.*, 64 App. D. C. 131, 75 Fed. (2d) 650, this Court held that the defense of the Statute of Limitations in an action at law cannot in this jurisdiction be raised by demurrer. In *Peyser v. Owen*, 73 App. D. C., 64, 116 Fed. (2d) 298, arising under the new rules, this court declined to consider appellants' contention that the defense of the Statute of Limitations should have been raised by answer rather than by motion to dismiss, inasmuch as the question was not raised in the trial court and was abandoned on oral argument in this Court.

If it were material to determine whether the defense of the Statute of Limitations could be interposed otherwise than by answer, it might be argued that there was a "failure to state a claim upon which relief could be granted," which is a defense which can be either by answer or by motion under Rule 12(b)(6). On the other hand, there is specific authority for pleading the Statute affirmatively by the inclusion of "statute of limitations" in Rule 8(c) dealing with affirmative defenses.

The appellee here certainly took the safe course by including the Statute as one of the five defenses set forth in the answer and then moving for summary judgment on the pleadings as authorized by Rule 12(c) upon the ground that it appears from the face of the complaint and the Fourth defense of the answer that the action was not commenced within the time limited by law (Appellants' App. 17). It is true that if there were facts necessary to be considered in order to sustain the plea of the statute which appeared only in the answer and not also in the complaint, these alleged facts, unless conceded for the purpose of the motion, would have to be disregarded in disposing of the motion for summary judgment; but insofar as the answer interposes the defense of the Statute of Limitations, it is material to the disposition of the appeal because it removes the possibility of a procedural question such as was involved in the cases above cited.

In *Brice v. Walker*, 73 App. D. C. 377, 121 F. (2d) 864 the procedure was identical to that here.

2. Except for the waiver the period within which suit could be brought expired September 1, 1935.

The facts from which it is known that the right of action on the notes here sued on accrued September 1, 1932, appear in the complaint. Of the notes secured by the third deed of trust, Nos. 101, 119, ~~and~~ 120 and 246, are mentioned in the waiver which was an exhibit to the complaint (Appellants' App. 11). The notes bearing the first three numbers mentioned are those sued on. The notes were dated September 1, 1924 and were payable on or before eight years after date (id. 5, 7 and 9).

The applicable Statute is Title 12, Section 201 of the 1940 District of Columbia Code (Section 1265 of the Code of 1901):

"No action shall be brought * * * upon any simple contract * * * after three years from the time when the right to maintain any such action shall have accrued;"

It appears plain that the right of action to recover the principal amounts of these notes would have been barred after September 1, 1935, and to recover quarterly installments of interest three years after unpaid instalments accrued, respectively, the one of earliest date having accrued June 1, 1931, and having been barred after June 1, 1934.

The fact that the cause of action accrued on September 1, 1932, as to the principal, made understandable the use of the date September 2, 1935 in the waiver, as the date until which action or suit on these notes should be withheld. A statement of appellee's view that this was the significance of the date used in the waiver September 2, 1935, was, quite unnecessarily, included in the fourth defense in appellee's answer (Appellants App. 14). It was a quotation by the trial justice of this portion of appellee's answer (id. 19) which has led appellants to assert that the trial justice

relied upon the answer rather than exclusively upon the complaint as the basis of his decision.

Appellants had stated in their complaint a different view as to the date when their cause of action accrued. They apparently think, or thought, that appellee's liability on these notes did not accrue until foreclosure of the first deed of trust had wiped out the security for the notes secured by the third deed of trust of which the notes sued on were a part (see paragraph 6 of complaint, Appellants App. 2).

The relevancy of appellants' theory is that if it were correct the otherwise obvious purpose of the use of the date September 2, 1935, in the waiver (viz, to postpone suit until the exact date the statute would have run on similar notes) would not be apparent, whereas the trial judge thought it was. In any event, however, the appellants' theory as to when the cause of action accrued is not sound, and its unsoundness is a legal consequence of the facts stated in the complaint; because limitations date from the maturity of secured notes, regardless of the date of foreclosure. To support this there need be cited only a case recently decided by this court, *Hoffman v. Sheahin*, 73 App. D. C., 374, 121 F. (2d) 861, and the considerations set forth in that opinion. The trial justice needed no facts other than those in the complaint to support his conclusion as to when the cause of action arose and when it would have been barred.

3. The waiver operated to extend the period within which suit could be brought for three years from September 2, 1935.

Appellants contend that the waiver operated to extend the time within which suit could be brought to a time beyond the date suit was filed, January 22, 1940.

The waiver itself does not expressly state any time or limit for its operation, and its lack of definiteness in this regard founds appellants' contention that it is an unlimited or permanent waiver of this defense.

Many jurisdictions, rightly we think, strike down express permanent waivers of the statute as contrary to the policy

of the law. Whether or not this is or should be the rule in the District of Columbia, it seems clear that an agreement or waiver should not be given the extraordinary effect of creating a perpetual right of action unless it expressly so provides.

The present waiver contains no words purporting to bind appellee other than that appellee "hereby" waives. To "waive" is intentionally to relinquish *in praesenti* a known right (67 C. J. 288, 299).

It might therefore be arguable that appellee waived only what had then accrued, nearly two years of the three year period to sue for principal, and more than the three year period with regard to earlier interest instalments. This is a construction advocated by the article in Columbia Law Review (Vol. 30, No. 3, p. 383, at p. 387) below referred to.

But there are words relating to the future in the paper, though they relate to appellants. It contemplates that there shall be no suit until September 2, 1935, then a year and two months hence, and construed as a whole, it was intended to bind appellee not to plead the statute if appellants refrained from suit until September 2, 1935, at which time the statute would have barred all notes of like date and maturity, including these, but for the waiver.

Consistently with claiming benefit of the waiver appellants could not sue before September 2, 1935, but on that date and thereafter they could sue. The situation created by the waiver was as though appellants' right to sue accrued September 2, 1935. But appellants did not sue until January 22, 1940, and then another three-year statutory period of inaction after September 2, 1935, as to which there was no waiver, barred them.

It is a natural and unstrained construction of the paper to conclude that appellants consistently with it could sue after September 1, 1935, without being confronted with the defense founded on the three years of inaction which that date completed. It is an unnatural and strained construction to assume that the parties had in mind barring such defense as would arise if again during the three years after

September 2, 1935, no suit was brought. Still more unnatural would it be to read into the waiver an agreement keeping this cause of action on notes open longer than all other actions at common law, longer than one in a judgment, or for the recovery of land, and forever, even now or a hundred years from now.

It is submitted that most favorably to appellants the waiver should be construed as would be an agreement which recited that inasmuch as a period of three years without suit will have elapsed from the accrual of the cause of action if no suit is brought before September 2, 1935, the appellee promises not to plead that three year period to a suit brought then or thereafter.

Appellants rely strongly on their view that the District of Columbia is aligned with the minority of jurisdictions which hold that there may be created by an agreement a perpetual bar to a plea of the statute. Our reply is that the waiver here involved cannot be construed to be such an agreement. We doubt, however, if the law of the District should be considered as settled contrary to the weight of authority, and a review of the authorities generally and of the early case in this Court relied on by appellants seems appropriate.

The more modern view now established by the weight of authority is that a promise never to plead the statute is illegal.

A review of the authorities contained in 34 Am. Jur., p. 320 et seq., includes the following:

“§407. Agreement to Waive Statute.—Statutes of limitation give effect to a sound public policy against the litigation of stale demands, and according to what appears to be the better view, the law does not permit the purpose of such a statute to be thwarted by an agreement to waive the benefit of the statute permanently. * * * The fact that an agreement to waive the statute of limitations is indefinite as to the duration of the waiver should not invalidate it, but the court should limit the operation of the waiver to a reasonable time. An agreement not to sue upon a demand until

the happening of a particular event has been held to suspend the running of the statute until such event occurs. * * *

“§408. Requisites and Sufficiency of Agreement.— In order to waive the defense of the statute of limitations by an agreement, as is permitted under the rule stated in the preceding section, it is, of course, essential that the agreement when properly construed have that effect. According to the better view, the agreement to waive the defense of the statute of limitations should not be made to operate permanently. * * *.”

A discussion of the subject in Williston on Contracts, Revised (1936) Edition, Vol. 1, p. 584, Section 183, under the title “Promises not to plead or never to plead the Statute of Limitations”, includes the following:

“Although in California it has been held that a contract not to plead the Statute, whenever made, may be binding indefinitely, the better view is that such enforcement is in violation of the public policy of the Statute, and the majority of jurisdictions so hold. Thus interpreted, that is, as a promise never to plead the Statute, it is immaterial when the promise is made, since, by the general view, such a promise is illegal whether made before or after maturity of the debt. But where the debt has already matured, a promise not to plead the Statute may properly be given the interpretation of a new promise to pay the debt, which, as has been seen, will extend the statutory period from the time the promise is made. * * * The commonly accepted view is, then, that a promise not to plead the Statute of Limitations can be effective only when, and to the extent that, an express acknowledgment or part payment of an antecedent debt, or a new promise to pay it, would be operative, and this is the rule laid down in the Restatement of Contracts.”

To the last statement Williston cites Restatement of the Law of Contracts, Section 86(2)(c), and see also the illustration given in the American Law Institute Committee Comment on sub-section (2 c).

As a matter of normal construction of a contractual instrument, the waiver in the instant case cannot be construed to amount to a promise to pay the alleged debt, as the waiver states the appellee has defenses (other than limitations) to the notes and expressly reserves them. Williston (*supra*, at § 184) discusses such promises as merely waive the statute which when relied and acted on have been held to create "promissory estoppels", as might be the view taken of the case at bar, but there was certainly here no representation or promise that delay *after* the period for which indulgence was asked would not be made the occasion for a plea of the statute. It is plain that Williston considers the better view that a general estoppel to operate indefinitely in the future would be contrary to the policy of the statute and illegal.

We have found no standard text writer taking a contrary position. There is, however, more uniformity of view that a perpetual waiver is bad than there is as to the permissible period or period to be inferred in case of a non-explicit agreement.

The following are representative text statements quoted with approval by appellate courts.

Bowers, Law of Waiver (1914), Sec. 218:

"The effects of a waiver of the Statute of Limitations can in no sense be extended to a permanent removal of its operation. The logical result is that such waiver creates a new period, starting the statute afresh and extending the same length of time as originally applying, unless the agreement is for a waiver for a limited time, in which event suit must be brought within a reasonable time, or the bar may again be invoked."

Wood, Limitation of Actions, Sec. 76:

"While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet, if made before the debt is barred and in consideration of forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such

promise, expires, either by way of estoppel, or as a conditional promise to pay the debt in case the plaintiff proves it."

A well-considered note in the 30 Columbia Law Review, No. 3, p. 383, issue of March, 1930, begins with this comment—

"Though at first the courts were hostile to the Statute of Limitations, it can now be safely said that it is regarded as a salutary bit of legislation which should be strictly enforced. The policy behind the statute seems to be one of public benefit as well as a desire to benefit the individual. * * * Whether the courts stress the public benefit aspect of the Statute or the individual protection aspect often determines the validity of a promise not to plead the Statute, and it is important that this be borne in mind while considering the cases and rules of law on this subject."

Appellants' reliance is upon *Mann v. Cooper*, 2 App. D. C. 266, decided February 5, 1894, as establishing the minority view as the law of the District of Columbia, to the effect that a debtor may by contract perpetually surrender or waive the right to plead the statute of limitations. It is true that the opinion in that case so states. Mann had recovered a judgment against Cooper's intestate on October 26, 1874, which had been sought to be enforced by *fi. fa.* in 1875. The judgment was sought to be revived and enforced against the appellee administratrix by *sci. fa.* issued June 27, 1891. Appellant had also brought against appellee a separate action on the judgment on July 9, 1891. To both the *sci. fa.* and the new action the appellee plead the twelve year statute of limitations. Appellant's third replication alleged a contract of May 18, 1876, with the original judgment debtor upon a new consideration whereby appellant should *at all times* have the right to execute on the judgment. The case arose on demurrer to this replication and the court held that if its allegations were supported by proof, it would be an answer to the plea of limitations. The judgment of the

court below which had sustained a demurrer to the replication was reversed and the cause remanded for further proceedings.

The case came back to this Court in *Mann v. McDonald*, 6 App. D. C. 548. Meantime, the replication had been amended so as to set out in full the agreement relied on to waive the statute. It then appeared that the original judgment defendant Cooper had in May, 1876, delivered to the judgment creditor as collateral security a paid-up life insurance policy, and that the agreement relied on was one evidencing the arrangement between the parties concerning this policy and its proceeds, and that though it used the words that the creditor should *at all times* have the right to execute on the judgment, the agreement as a whole indicated that it could not be construed as such a perpetual waiver of the statute of limitations as had been supposed by the court in passing on the demurrer. The original judgment defendant had died in April, 1879, and the proceeds of the policy had been applied in part payment of the judgment. On this appeal the judgment of the court below sustaining the demurrer to the replication was affirmed.

Taking both cases together, it appears that though this Court did hold that as a matter of legal theory there could be an agreement perpetually barring a plea of the statute of limitations, it has not held in any case that an agreement shall have that effect.

More important, however, is the fact that in the case of *Mann v. Cooper* this Court relied principally upon and quoted extensively from *Randon v. Tobey*, 11 How. 493, 519, 13 L. ed. 784, 795. This Supreme Court case is entitled to equal respect in determining the law of the District of Columbia, and it is consistent with the general rule. It was a suit on promissory notes which would have been barred by limitations but for an agreement contemplating further indulgence to the debtor upon his agreement to pay on account of them one-half of his cotton crop in each year, which agreement contained the clause "I further bind and obli-

gate myself, my heirs, assignees and administrators, that no advantage shall be taken, or any plea of statute of limitations be made, to avoid the payment of said notes, but they shall be and remain in as full force and effect as though they were renewed." The suit was brought within the period of limitations after the agreement. The Supreme Court did not hold that a plea of the statute would be forever barred, but on the contrary, speaking of the agreement, said—

"It extended the time of payment, and the statute did not begin to run till the extended time had expired."

We are not aware of any other local or Supreme Court decisions bearing directly upon the question here to be decided.

The Supreme Court has repeatedly declared its attitude toward the Statute of Limitations. In *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807, 808, the Court said:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

This was quoted with approval in *United States v. Oregon Lumber Co.*, 260 U. S. 290, 299, 67 L. ed. 261, 270. Again, in *Guaranty Trust Co. of N. Y. v. United States*, 304 U. S. 126, 136, 82 L. ed. 1224, 1230, the Court said:

"The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest."

As indicating views at least consistent with our position, we cite *Andreae v. Redfield*, 8 Otto 225, 239, 25 L. ed. 158, 164, where the law of New York is applied, and *Shapley v. Abbott*, 42 N. Y. 443, which had overruled earlier New York cases, is approved. Later New York cases more directly in point quote and rely upon the case last mentioned, for example, *Mutual Life Insurance Co. v. U. S. Hotel*, 144 N. Y. S. 476. Another Federal case consistent with our contentions is *Green v. Coos Bay Wagon Road Co.*, 23 Fed. 67, in the Circuit Court for the District of Oregon in 1885.

One of the many state cases condemning waivers of indefinite duration on principle and authority, which is useful as containing quotations from prior cases is *First Nat. Bank v. Mock*, 170 Colo. 517, 203 Pac. 272, 21 A. L. R. 770.

4. The Fact that the Waiver Was Under Seal Does Not Affect Its Construction or Operation.

This action is brought on the notes. The waiver obviously could not be sued on as it is in effect a denial of liability, not a promise of payment. The Statute of Limitations deals with the bringing of suits, and the limitation of time which is material is the time within which suits on notes can be brought.

Appellants have contended that the fact that a longer period of time is allowed by the local statute of limitations for the bringing of suit on sealed instruments is material here, and that the present suit could be brought at any time within twelve years after the waiver. As the trial justice aptly remarked (Appellants' App., 21), this argument of the appellants "proceeds from a wrong premise".

In addition to what the trial justice said on this subject, which seems to us to be sufficient to dispose of this contention, we may add that in appellants' brief in the court below, counsel stated that they had been unable to find any instance of a contract of waiver under seal except the case of *McIntosh v. Condron*, 20 Pa. Supr. 118. Examination of this case

will disclose that it holds expressly (p. 123) that the action there was on the notes, not on the waiver, and that the effect of the waiver was to give a second equal period of limitations, precisely as we contend in the present case. Appellants have not renewed their citation of this case in this Court, nor have they attempted to support separately this, their second point, on this appeal.

In Williston on Contracts, Section 185, similar contentions are discussed and it is unequivocally stated—

“A mere acknowledgment under seal of a simple contract debt will not operate as a new sealed promise, and will at most revive the debt for the statutory period applicable to informal contracts.”

The contention of the appellant is similar to that overruled by this Court in *Brice v. Walker*, 73 App. D. C. 377, 121 F. (2d) 864, where it was unsuccessfully contended that the period of limitations for a sealed instrument should be applied to a suit on a note payment of which was secured by a sealed deed of trust which recited the debt.

5. No Facts Not Appearing in the Complaint Are Relied On.

The third point of the appellants is that the District Judge accepted as true and relied on matters averred in the defendant's pleas. The particular matters so relied on and complained of are not pointed out in the brief, but appellant's must refer to the quotation from the fourth defense made by the trial justice in his opinion (Appellants' App., 19). This contention has already been partially answered under headings numbered 1 and 2 of this brief.

In addition to what is there said, we call attention to the fact that the trial justice did not as a matter of fact adopt the construction ascribed to the waiver agreement by the allegations he quoted from the fourth defense. On the contrary, he proceeded, as we have in this brief, to construe the agreement from its own four corners in the light of the allegations in the complaint.

In the fourth defense as quoted by the Court, the agreement was described as one by reason of which "the running of the statute of limitations should cease from that date until September 2, 1935" (Appellants' App. 19). Quite different from this is the construction of the agreement adopted by the court below and contended for in this brief, viz., that the running of the statute of limitations for the entire period from the time the notes came due, September 1, 1932, until September 2, 1935, was waived, and the statute began to run afresh September 2, 1935 (id. 21).

It is respectfully submitted that in no respect excepting as a plea raising a defense of the statute of limitations did the court below rely upon the fourth defense, nor need any facts be relied upon to sustain it other than those appearing from the complaint.

CONCLUSION.

It is respectfully submitted that the judgment of the court below was correct and should be affirmed.

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